RECONSIDERING BURDENS OF PROOF:
IDEOLOGY, EVIDENCE, AND INTENT IN INDIVIDUAL
CLAIMS OF EMPLOYMENT DISCRIMINATION

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INTRODUCTION

In McDonnell Douglas Corp. v. Green,1 the Supreme Court devised a test for individual claims of employment discrimination which has since become ubiquitous. The application of this test has become ever broader, as claims for employment discrimination have expanded to discrimination on the basis of age and disabilities,2 as jury trial has become more widely available under the Civil Rights Act of 1991,3 and as individual claims have displaced class claims as the principal vehicle for eliminating discrimination in the workplace.4 Yet the significance of this test in any particular case seems to be inversely proportional to its generality. It is quoted, more often than not, in cases in

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which it is not decisive, or even helpful.\textsuperscript{5} The decision is no longer just a precedent, or even a leading case; it has ascended to the status of boilerplate. What accounts for this paradox?

\textit{McDonnell Douglas} established a now familiar structure of proof. The plaintiff must first produce evidence "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications."\textsuperscript{6} If the plaintiff carries this burden, as she usually does, the burden of production shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee’s rejection."\textsuperscript{7} If the defendant carries this burden, as again she usually does, the plaintiff must show that the stated reason for her rejection was a pretext for discrimination.\textsuperscript{8}

Despite the generality of this test, it has never been strictly applied according to its literal terms. Even as it was originally formulated, it was meant to be flexible, to vary according to the facts of each case.\textsuperscript{9} In subsequent decisions, the test was narrowed to make clear that it does not shift the burden of persuasion,\textsuperscript{10} and indeed, that it ceases to do any work after the plaintiff has submitted evidence discrediting the legitimate, nondiscriminatory reason offered by the defendant.\textsuperscript{11} In this situation, it is not \textit{McDonnell Douglas}, but the recent decision in \textit{Price Waterhouse v. Hopkins}\textsuperscript{12} which is decisive. It has become correspondingly difficult to distinguish the scope of the two decisions from

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  \item \textsuperscript{5} E.g., EEOC v. Metal Serv. Co., 892 F.2d 341, 347-48 (3d Cir. 1990); Montana v. First Fed. Sav. & Loan Ass’n, 869 F.2d 100, 104 (2d Cir. 1989).
  \item \textsuperscript{6} 411 U.S. at 802 (footnote omitted).
  \item \textsuperscript{7} Id.
  \item \textsuperscript{8} Id. at 804.
  \item \textsuperscript{9} Id. at 802 n.13; accord Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).
  \item \textsuperscript{10} Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).
  \item \textsuperscript{12} 490 U.S. 228 (1989).
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one another.\textsuperscript{13} The difficulty goes deeper, however, than questions of scope; it extends all the way back to the original decision in \textit{McDonnell Douglas},\textsuperscript{14} and even further, to the requirement of proof of intentional discrimination.

At a simple, functional level, \textit{McDonnell Douglas} has not been effective in resolving motions for summary judgment or for directed verdict or judgment notwithstanding the verdict. As the right to jury trial has been extended to all claims of intentional discrimination in employment, the screening function of these motions has become increasingly important, and the structure of proof under \textit{McDonnell Douglas} increasingly inadequate. The burden imposed upon the plaintiff by \textit{McDonnell Douglas} is so easily satisfied that it does not allow cases to be screened from trial or from the jury. To compound the problem, the burden upon the defendant is also easily satisfied, leaving most cases to be resolved in an unstructured consideration of the issue of pretext, which is identical to the ultimate issue of intentional discrimination.\textsuperscript{15}

At a deeper level, \textit{McDonnell Douglas} unsuccessfully attempts to adapt the model of discrimination from constitutional law to the distinctive factual and institutional setting of employment discrimination cases. It attempts to impose this model on the widely varying facts and evidence in these cases through a single structure of shifting burdens of production. In doing so, however, it adds an unnecessary layer of ideological controversy to employment discrimination law which complicates, instead of simplifies, the practical problems in this field. For the right, which has largely controlled the application of \textit{McDonnell Douglas}, it is an ideology which imports into employment discrimination law the obscure and difficult restrictions of the concept of intentional discrimination in constitutional law. For the left, which has re-

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\bibitem{15} See infra text accompanying notes 50-61.
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cently prevailed in a similar controversy over the theory of disparate impact.\textsuperscript{16} \textit{McDonnell Douglas} represents an opportunity to convert proof of subjective intent into objective evidence of the sufficiency of the defendant's reasons for rejecting the plaintiff. This debate focuses upon the concept of intentional discrimination in constitutional law: either it should be imported or rejected in its entirety in the law of employment discrimination.\textsuperscript{17} These all-or-nothing positions, defined by reference to an obscure concept in a different field of law, suggest that the terms of this debate are mistaken and that the structure of proof from \textit{McDonnell Douglas} no longer provides a suitable vehicle for carrying it forward.

This Article argues for the reform of \textit{McDonnell Douglas} in five parts. Part I examines the definition of intentional discrimination and criticizes the tacit adoption of standards from constitutional law. Part II then briefly recounts the rise, the decline, and the fall of \textit{McDonnell Douglas}. Part III examines the complications introduced by the recent decision in \textit{Price Waterhouse}. Part IV analyzes the attempts of the lower federal courts to adapt \textit{McDonnell Douglas} into a workable structure of proof. Part V then elaborates upon these attempts to revive burdens of proof as a useful means of resolving individual claims of employment discrimination.

I. INTENTIONAL DISCRIMINATION: DEFINING A REDUNDANCY

The decision in \textit{McDonnell Douglas} and its subsequent interpretation is a familiar story. No less familiar, but less frequently recalled, is the network of legal doctrine in which this story is embedded. \textit{McDonnell Douglas} arose at the intersection of two sources of law: constitutional law, which contributed the definition of prohibited discrimination, and labor law, broadly conceived, which has moved in recent years toward a general requirement of just cause for discharge. These two sources of law were only implicit in \textit{McDonnell Douglas}, but they


\textsuperscript{17} See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981) (defendant need not submit evidence of objective qualifications); Furnco Constr. Co. v. Waters, 438 U.S. 567, 577-78 (1978) (defendant need not maximize the number of minorities or women considered).
are evident in the recent decision in *Price Waterhouse*, which was based equally on decisions in constitutional law and labor law. They are equally apparent in the immediate purpose and effect of laws against discrimination in employment, such as Title VII. These laws extend the constitutional prohibition against discrimination from government action to private employment, and some of them, such as the Age Discrimination in Employment Act (ADEA), extend the constitutional prohibition still further, to forms of discrimination, such as discrimination on the basis of age, not prohibited by the Constitution itself.

The divergent roots of employment discrimination law account for some of the ambiguity in the formulation and effect of the burdens of proof under *McDonnell Douglas*. The constitutional definition of intentional discrimination has oscillated with some uncertainty between a formal definition that emphasizes the defendant’s intent and a practical need to rely upon objective evidence of differences in treatment. To the extent that laws against employment discrimination require proof of intent, as they do under *McDonnell Douglas*, they replicate the uncertainties of the constitutional definition, which usually work to the plaintiff’s disadvantage. The uncertain definition of intentional discrimination becomes a requirement that the plaintiff obtain elusive evidence of the employer’s state of mind, a requirement which becomes all the more difficult when the employer, as is commonly the case, is an institution, not an individual. These ambiguities are amplified, but in the opposite direction, by the trend in labor law towards a

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general requirement of good cause for discharge.\textsuperscript{23} \textit{McDonnell Douglas} can be seen as part of this general trend because it requires the employer to advance some good reason for rejecting the plaintiff.

Proof of pretext under \textit{McDonnell Douglas} is what sets individual claims of employment discrimination apart from proof of wrongful discharge. As many cases have emphasized, the plaintiff must do more than simply discredit the "legitimate nondiscriminatory reason" offered by the defendant; the plaintiff must also prove that this reason is a "pretext."\textsuperscript{24} But a pretext for what? "Intentional discrimination" is the invariable answer,\textsuperscript{25} but this well-worn phrase just carries with it all the problems that have arisen over its interpretation in constitutional law. In particular, it presupposes the possibility of "unintentional discrimination," an idea which, outside of technical legal jargon, seems to be a contradiction in terms. Discrimination is an intentional act, whether it is bad, as in "racial discrimination," or good, as in "fine discrimination of color." In technical legal terms, "unintentional discrimination" refers to the theory of discriminatory effects, but this theory, which itself is controversial, does little to clarify the concept of intentional discrimination. The seeming contrast between intentional and unintentional discrimination is part of the problem, not part of the solution.

Instead of relying upon these judicial glosses on the statute, or their offspring, "disparate treatment" and "disparate impact,"\textsuperscript{26} it is better to return to the statutory language. What is notable about the central prohibitions of Title VII is that they use no simple formula to define what is prohibited. Indeed, the word "intentionally" does not appear until the remedy section of the statute, which requires a prior finding that the defendant "has intentionally engaged in or is inten-


\textsuperscript{26} International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).
tionally engaging in an unlawful employment practice.” The closest that the statutory language comes to endorsing a single requirement is the phrase “because of,” which links a wide variety of different employment practices to “race, color, religion, sex, or national origin”; no employment decisions can be made “because of” these characteristics. In this context, “because of” means based upon: an employer cannot use “race, color, religion, sex, or national origin,” as a reason for rejecting an applicant for employment, discharging an incumbent employee, or denying other employment opportunities.

“Because of” could also be interpreted, of course, to invoke the concept of intentional discrimination. Reasons for action can always be subsumed under a more general analysis of intentional action. To substitute intentional action for reasons for action, however, is to sacrifice a useful, specific concept which narrows the range of inquiry for a broader concept that embraces a wide range of constitutional claims, from school desegregation to housing to voting rights. As applied to Title VII, the terminology of intentional discrimination raises, but fails to address, the question of the respect in which the action is intentional. Is it the fact that the employer, for instance, intentionally fired the plaintiff? Or that the employer intended to express hatred of anyone of the plaintiff’s race? Or is it that the employer intended to take account of the plaintiff’s race? These questions can be answered without appealing to the open-ended and ambiguous concept of intentional discrimination. An analysis in terms of reasons comes closer to capturing the meaning of “because of” in the central prohibitions of Title VII.

This analysis makes sense of more than an isolated phrase in Title VII. It also makes sense of the variety and redundancy of the prohibi-

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tions in Title VII. These provisions directly reflect the overriding concern of Congress to prohibit all forms of discrimination, including discrimination hidden behind a seemingly legitimate reason. Other-wise the elaborate prohibitions in the statute can only be explained as so much excess verbiage. Why, for instance, did Congress prohibit discrimination on the basis of color, as well as discrimination on the basis of race? Or why did it prohibit both discrimination in section 703(a)(1) and also segregation in section 703(a)(2)? Why, in addition to these general prohibitions, did it also prohibit failing or refusing to hire, discharging, limiting, or classifying employees on a prohibited basis? Other provisions of the statute also exhibit an overriding concern with pretextual discrimination, such as the defenses for seniority systems and for testing in section 703(h). An advantage of an analysis of the statutory language in terms of reasons for action is that it makes the concept of pretextual discrimination, which is central to both the statute and the cases interpreting it, immediately clear. Any discriminatory reason makes the employer’s decision prohibited, even if the employer also had other, legitimate reasons as well.

A further, and equally important, advantage of the terminology of reasons for action is that it captures the ambivalent attitude of Congress towards such legitimate reasons. On the one hand, Congress tried to eliminate the opportunity for pretextual discrimination. On the other, it acknowledged a range of legitimate reasons that employers could offer for their personnel decisions. Like the word “intentionally,” this policy made its most explicit appearance in the remedial section of the statute, section 706(g). The last sentence of this section denies any remedy to any individual who “was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin.” This provision anticipates the “mixed motive” cases like Price Waterhouse, in which the employer has more than one reason for his decision, at least one of which is discriminatory. The same principle of employer autonomy has recently been modified and recodified by the Civil Rights Act of 1991, which emphasizes, first,

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29 I have developed this argument in another article. Rutherglen, supra note 19.
31 Id. § 2000e-5(g) (1988).
that any consideration of a prohibited factor violates the statute, but second, that an employer can avoid compensatory remedies by proving that the plaintiff would have been rejected anyway.\footnote{Pub. L. No. 102-166, § 107, 105 Stat. 1071 (1991) (to be codified at 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B)). The same principle has also appeared in surprising places, for instance, as the principal justification for allowing voluntary forms of affirmative action. United Steelworkers v. Weber, 443 U.S. 193, 208-09 (1979).} This principle protects employer autonomy by restricting judicial interference with wholly legitimate business decisions.

Protecting employers from judicial interference under Title VII seems to correspond to preserving the democratic powers of the legislature under the Constitution. It is a mistake, however, to suppose that the legitimate, nondiscriminatory reasons of the employer under \textit{McDonnell Douglas} have some exact analogue in constitutional law. They do not, for instance, correspond to the “compelling state interests” necessary to justify racial classifications by the state. After all, at such a preliminary stage of the case, discrimination has not yet been proved.\footnote{Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579-80 (1978).} They do, however, bear a disturbing resemblance to the legitimate government interests that are sufficient to form a rational basis for economic regulation. In the standard formulation, these interests are sufficient to justify a government decision on any rationally conceivable set of facts.\footnote{Williamson v. Lee Optical, Inc., 348 U.S. 483, 489-91 (1955).} Transposed to the employment setting, the same conception of legitimate interests yields the defendant’s burden of rebuttal under \textit{McDonnell Douglas}: “to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”\footnote{411 U.S. at 802.} In subsequent cases, the Supreme Court has emphasized just how light this burden is. For instance, “[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons.”\footnote{Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) (citation omitted).} Just as there are no decisions that find a legitimate state interest insufficient to uphold economic regulation, neither are there any which find the defendant’s legitimate, nondiscriminatory reason inadequate to rebut a prima facie case.
The flaw in the constitutional analogy implicit in the ideological structure of *McDonnell Douglas* is that it equates judicial deference to the legislature with judicial deference to the employer. A reason in the abstract, which justifies economic regulation in constitutional law, is wholly inadequate to justify an employment decision. Discovering the employer's actual reasons, and distinguishing good reasons from bad reasons, was the central congressional concern in enacting and in amending Title VII. It turns the congressional scheme upside down to insist that limitations upon the ultimate goal of eliminating pretextual discrimination should be given priority over the goal itself. Employers should be required to offer not just a legitimate reason for their decisions, but evidence that the reason actually was theirs: that it was followed in similar cases or that it forms part of some larger business strategy. Legislatures, by contrast, must be allowed wide latitude to offer reasons in support of legislation, whether or not these reasons are followed consistently. Where democratic values argue for judicial deference toward legislatures, they argue against judicial deference to employers. It was Congress, after all, that enacted Title VII and the other federal laws against employment discrimination. To paraphrase Chief Justice Marshall, we must remember that it is a statute, not the Constitution, that the courts are interpreting in Title VII cases.37

Consider, for instance, the difference between the intentions of an employer and the intentions of a legislature. When a disputed employment decision is made by a single individual, it is a matter of determining his reasons for rejecting the plaintiff. Even when the employer is a corporation or government agency engaged in some form of collective decision-making, it is easier to hold employers liable for the wayward reasons of their agents than to bind a legislature by the statements of a single representative. An employer's agent need only have participated in the disputed decision, even if the agent's reasons departed from those officially acknowledged by the employer. If the agent played no role in the decision adverse to the plaintiff, the agent's reasons played no role either.38 This inquiry is simpler and less controversial than the corresponding inquiry into legislative motive,

which often requires an examination of the conflicting statements of legislators from opposing parties, factions, or special interest groups. Individual legislators have a right to freedom of debate. No similar democratic principle is threatened if courts closely examine the reasons offered by employers and their agents.\textsuperscript{39}

Of course, under existing law, courts do closely examine the reasons offered by employers and their agents, but only at the pretext stage of the case. The force of the analogy to constitutional law has resulted not in protecting employers from judicial intervention, but in undermining the effectiveness of the structure of proof created by \textit{McDonnell Douglas}. The courts have reasoned that the bare possibility of discrimination, which is all that can be inferred from the plaintiff’s prima facie case, is inadequate to impose any but the lightest burden of production upon the defendant in rebuttal.\textsuperscript{40} What the courts have missed is that the employer’s reasons for rejecting the plaintiff, whether they are discriminatory or legitimate, must be based on more than an amorphous inquiry into the employer’s state of mind. Both kinds of reasons must be connected to the larger aims of what an employer, or his agent, is trying to accomplish.\textsuperscript{41} It is not enough for an employer just to avow a reason, or for a plaintiff to attribute it to him, to make it his. It must fit in with the attitudes and beliefs of an employer or his agents as these are reflected in his employment practices. Otherwise, it is not his reason at all.

Whatever the ambiguities of an analysis in terms of discriminatory reasons, it starts off without the very broad, almost indefinite scope of “intentional discrimination” in constitutional law. An open-ended inquiry into intention is likely to sidetrack legal analysis into a needless opposition between subjective, mental elements of a claim and objective, physical elements. So a theory of intentional discrimination seemingly requires proof of a prohibited state of mind, while a theory

\textsuperscript{39} For much the same reasons, a constitutional claim of discrimination against a public employer should be analyzed like a Title VII claim, unless it also includes a claim that a statute, not preempted by Title VII, is unconstitutional. In any event, Title VII already covers most aspects of public employment. Civil Rights Act of 1964 § 701(b), § 717(a), 42 U.S.C. § 2000e(b), § 2000e-16(a) (1988).

\textsuperscript{40} Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577-78 (1978).

\textsuperscript{41} See Donald Davidson, Essays on Actions and Events 85 (1980).
of disparate impact requires proof only of prohibited effects. Such a
distinction might work well in some areas of constitutional law, al-
though even there it has come under sustained attack. 42 In employment
discrimination law, it obscures the objective nature of an agent’s rea-
sons for her decision by characterizing them as wholly subjective. We
are therefore misled into believing that such reasons are inherently un-
certain and difficult to prove.

Although there are, of course, difficult cases in which the true rea-
sons for an employer’s decision cannot be ascertained, there is no need
to exaggerate these difficulties. An employer who offers reasons that
he would not apply to individuals of a different race or sex than the
plaintiff does not have those reasons. Reasons that the employer would
not act upon in other cases, which are otherwise similar to the plain-
tiff’s, are not his reasons at all. The terminology of “disparate treat-
ment” reflects this insight by referring to differences in treatment, but
it does not offer anything other than a stipulated technical definition to
distinguish disparate treatment from disparate impact. It is the dispari-
ties that are important under both theories of liability, but it is only the
theory of disparate treatment that concerns discriminatory reasons. 43
An employer who has not, in fact, acted upon the same reasons to re-
ject employees or applicants of a different race or sex should have the
burden of coming forward with evidence why the present case is dif-
f erent.

So, too, an employer, or more likely its agent, who has allegedly
discriminated must have some motive or belief that could result in dis-
crimination in other cases. Racist and sexist attitudes are prevalent in
American society, but it makes little sense to infer discrimination, as
McDonnell Douglas does, from the minimal proof of a prima facie
case. The fundamental defect in its structure of proof is that it first
invites the court to draw an inference of discrimination in the abstract,
only to allow the employer to negate this inference with evidence of a
legitimate reason in the abstract. Both the burden upon the plaintiff

42 Theodore Eisenberg & Sheri Lynn Johnson, The Effects of Intent: Do We Know How
Legal Standards Work?, 76 Cornell L. Rev. 1151, 1160-62 (1991); Ortiz, supra note 22;
David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U. Chi. L. Rev. 935
(1989).

43 Even so, it is easy to exaggerate the differences between the two theories, an issue that I
have analyzed elsewhere. Rutherglen, supra note 19, at 1299-1311.
and the burden upon the defendant must be increased if they are to do any work in resolving claims of intentional discrimination. The major contribution of *McDonnell Douglas* was to require the defendant to come forward with a "legitimate, nondiscriminatory reason." This insight must be carried a step further. The defendant must come forward with evidence that its offered reason was its real reason, and the plaintiff must respond with evidence discrediting that reason or with other evidence establishing a discriminatory reason.

The erroneous belief that no one else can become fully aware of an agent’s reasons has, as its flip side, the equally erroneous view that the agent herself is always aware of them. Such issues have usually gone under the heading of “unconscious discrimination,” a term which unfortunately presumes a Freudian psychology of pervasive, but repressed, discriminatory attitudes.\(^{44}\) It is not necessary to resort to such dubious presuppositions in analyzing these problems. They can be better analyzed in terms of reasons that an agent is aware of, but fails to recognize as discriminatory.\(^ {45}\) For instance, in *Price Waterhouse*,\(^ {46}\) the plaintiff claimed that she was rejected for a partnership in an accounting firm on the basis of sex, but the evidence showed that she was rejected because she was too abrasive “for a woman,” at least in the eyes of some of the partners who made the decision.\(^ {47}\) The partners could be held liable, even if they were not aware that this reason was discriminatory, based on familiar arguments that ignorance of the law is no excuse. Employers can be held liable for relying on a prohibited reason without knowing that it is prohibited, just as criminal defendants can be punished for engaging in prohibited conduct without knowing of its illegality. A prohibited reason, just like prohibited conduct, must be attributable to the employer; he need not be aware that it fits the description of a prohibited reason or a prohibited act.

Once we have demystified the reasons for an employer's decision, we can see what the general problem is with existing approaches to

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\(^{44}\) E.g., Charles Lawrence, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 (1987).

\(^{45}\) See Davidson, supra note 41, at 85.

\(^{46}\) 490 U.S. at 250 (plurality opinion of Brennan, J.).

proof of discrimination against individuals. It is that fear of putting too heavy a burden upon the employer has led the courts to put too light an initial burden upon both parties. If everything is left to the issue of pretext, and now mixed motivation, little has been accomplished by the structures of proof erected in McDonnell Douglas and Price Waterhouse. It is to a detailed discussion of those cases that we now turn.

II. WHAT EVER HAPPENED TO MCDONNELL DOUGLAS?

In light of the tensions and ambiguities surrounding the concept of intentional discrimination, it is no wonder that McDonnell Douglas promised more than it could deliver. The case itself concerned a claim of racial discrimination by Percy Green, a black civil rights activist, who had once worked for McDonnell Douglas and had participated in several acts of civil disobedience protesting its employment practices. When Green reapplied for a job with McDonnell Douglas, his application was rejected. The Supreme Court held that in the absence of direct evidence of racial discrimination, Green’s claim was to be evaluated according to the structure of shifting burdens of production set forth in the opinion. In a forewarning of what would happen to this structure of shifting burdens, the Court found that the plaintiff had satisfied his initial burden and that the defendant had articulated a legitimate reason for its decision not to reemploy him, namely unlawful (but nonviolent) acts directed against its operations. That left only the issue of pretext to be decided on remand. Moreover, pretext was defined in terms that applied equally well to intentional discrimination: “Petitioner [McDonnell Douglas] may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.”

The opinion in McDonnell Douglas also took care to distinguish claims of intentional discrimination under its structure of burdens

48 411 U.S. at 802-04. Green also claimed that he was denied a job in retaliation for his protests against discriminatory employment practices in violation of § 704(a), 42 U.S.C. § 2000e-3(a) (1988). This claim was not addressed by the Supreme Court. Id. at 796-97.
49 Id. at 802-04.
50 Id. at 805.
51 Id. at 804.
from claims of disparate impact under *Griggs v. Duke Power Co.* The latter are the closest that employment discrimination law has come to imposing liability based only on the objective effects of an employer’s personnel decisions. The distinction between claims under *McDonnell Douglas* and claims under *Griggs* is intertwined with the definition of the defendant’s burden of articulating a legitimate, non-discriminatory reason, in terms both of what must be shown and whether it includes the burden of persuasion. When *McDonnell Douglas* was decided, the defendant’s burden under the theory of disparate impact was thought to be quite heavy. Once the plaintiff had established that a neutral employment practice had a disparate impact, the defendant had the burden of proving that the practice was justified by “business necessity” or bore some “manifest relationship” to performance on the job. Moreover, the language of *Griggs* seemed to place the burden of persuasion on this issue, not just the burden of production, squarely on the defendant. Only subsequently did the Supreme Court change position on these questions, and it was promptly overruled by Congress in the Civil Rights Act of 1991.

By contrast, the Court has consistently emphasized that the burden upon the defendant under *McDonnell Douglas* is simply a burden of production, not a burden of persuasion. The Court has also made clear that even this burden upon the defendant is light; it is a burden only to produce sufficient evidence to dispel the inference of discrimi-

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54 *Griggs*, 401 U.S. at 431-32.
55 Id. at 432; accord Albemarle Paper Co. v. Moody, 422 U.S. 405, 431-36 (1975).
56 This trend started in New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 & n.31 (1979), and Washington v. Davis, 426 U.S. 229, 248-52 (1976), which reduced what the defendant had to show. It culminated in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), which relieved the employer of the burden of persuasion. Id. at 658-60. Not surprisingly, in taking this step, the Court relied on cases limiting the scope of *McDonnell Douglas*. Id. at 659-60.
nation raised by the plaintiff's prima facie case. The plaintiff's case does not require a finding of discrimination; it is simply evidence sufficient to satisfy her initial burden of production, which is also light.\footnote{Burdine, 450 U.S. at 253-54; Furnco, 438 U.S. at 579-80.} Having emphasized how light both of these burdens are, the Court took the next step and recognized that most cases should be resolved on the issue of pretext, not by determining whether these initial burdens have been satisfied.\footnote{United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983).}

As in \textit{McDonnell Douglas} itself, however, the issue of pretext has proved to be indistinguishable from the ultimate issue of intentional discrimination. The Court's definitions of intentional discrimination have emphasized evidence about the plaintiff's qualifications and performance, the defendant's standards, and the defendant's treatment of other employees.\footnote{Price Waterhouse v. Hopkins, 490 U.S. 228, 243-45 (1989) (plurality opinion of Brennan, J.); id. at 258-60 (White, J., concurring in the judgment); id. at 276-77 (O'Connor, J., concurring in the judgment); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1976), quoted in Furnco, 438 U.S. at 577, and Aikens, 460 U.S. at 715.} It was exactly such evidence, especially evidence of how the defendant treated employees similar to the plaintiff but of a different race or sex, that the Court singled out in \textit{McDonnell Douglas} as especially good evidence of pretext.\footnote{411 U.S. at 804.} The structure of proof established in \textit{McDonnell Douglas} therefore does little to get the court beyond the unstructured issue of intentional discrimination.

The Supreme Court has also confined the scope of \textit{McDonnell Douglas} in other ways. In the case itself, the Court recognized that there were other means of proving intentional discrimination.\footnote{Id. at 802 n.13.} Soon afterwards, the Court held that the first element of the plaintiff's prima facie case, membership in a minority group, did not preclude claims for reverse discrimination,\footnote{McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 n.6 (1976).} although it subsequently held that an affirmative action plan constituted a legitimate, nondiscriminatory rea-
son in rebuttal to such claims.\textsuperscript{64} Even apart from reverse discrimination, the plaintiff who presents direct evidence of discrimination need not prove any of the elements of the prima facie case. Direct evidence alone is sufficient to generate a reasonable inference of discrimination.\textsuperscript{65}

In cases tried to a jury, as many will be after the Civil Rights Act of 1991,\textsuperscript{66} \textit{McDonnell Douglas} should have no effect on how the jury is instructed. The jury instructions need not mention the plaintiff's initial burden or the defendant's rebuttal burden since these are only burdens of production. Burdens of production determine only which cases go to the jury, not how the jury decides cases that are submitted to it. The jury needs to be instructed only on the definition of pretext and on the burden of persuasion which, on this issue, remains with the plaintiff.\textsuperscript{67} As we have seen, \textit{McDonnell Douglas} also has little effect on which cases get to the jury, since the initial burden of production on the plaintiff and the rebuttal burden on the defendant are both quite light. The plaintiff's burden of production on the issue of pretext is heavier, but it is identical to the plaintiff's burden on the issue of intentional discrimination.

In cases tried to a judge, \textit{McDonnell Douglas} has still less effect, since the judge will rarely be concerned with whether any burdens of production have been satisfied. Instead of deciding whether there is sufficient evidence to submit the case to the jury, the judge will just make findings of fact on the ultimate issue of discrimination. These findings, moreover, are reviewable on appeal like any other findings of fact; they can be reversed only if they are "clearly erroneous."\textsuperscript{68}

\textsuperscript{64} Johnson v. Transportation Agency, 480 U.S. 616, 626 (1987). At least in theory, the plaintiff in a reverse discrimination action bears both the burden of production and the burden of persuasion to show that an affirmative action plan is invalid. Id.

\textsuperscript{65} Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985); Ramsey v. City of Denver, 907 F.2d 1004, 1007-08 (10th Cir. 1990), cert. denied, 113 S. Ct. 302 (1992); EEOC v. Alton Packaging Corp., 901 F.2d 920, 923 (11th Cir. 1990).


\textsuperscript{67} See infra note 86.

The parties also will pay little attention to *McDonnell Douglas* since it does not govern the order of proof. Both parties would be well advised to submit all their evidence on every issue as part of their case-in-chief, whether or not it is an issue on which they have the burden of production. Otherwise, they face the risk that any additional evidence may be excluded later on the ground that it does not respond to the opposing party's evidence.\(^{69}\) If *McDonnell Douglas* does not help the jury, the court, or the parties, what good is it?

**III. What Went Wrong in Price Waterhouse?**

The confusion created by *McDonnell Douglas* has been compounded by the decision in *Price Waterhouse v. Hopkins*,\(^ {70}\) which concerned the burden of proof in cases of "mixed motivation," in which the disputed employment decision is based partly on a prohibited reason and partly on a legitimate reason. In *Price Waterhouse*, the trial judge had found that the plaintiff was denied promotion to partner in an accounting firm in part because she was a woman. The defendant argued, on the other hand, that her denial was based entirely on legitimate concerns about her lack of "interpersonal skills." The Court held that the defendant had the burden of production and persuasion on the existence of reasons, wholly apart from the plaintiff's sex, that would have led it to deny the plaintiff a partnership. This overall result is consistent with decisions in constitutional law and labor law,\(^ {71}\) but it raises both theoretical and practical problems when applied to employment discrimination cases, especially those tried to a jury. These problems have been alleviated to a degree by the Civil Rights Act of 1991, which has limited the defense from *Price Waterhouse* to the issue of compensatory remedies, not to declaratory relief, prohibitory injunctions, or attorney's fees.\(^ {72}\) The Act draws a sharp distinction

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\(^{69}\) McCormick on Evidence 6-8 (Edward Cleary 3d ed. 1984); Mack A. Player, Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Variations on a Title VII Theme, 17 Ga. L. Rev. 621, 666-67 (1983); see Fed. R. Evid. 403 (judge can exclude relevant evidence to avoid "undue delay" and "waste of time"); Fed R. Evid. 611 (judge shall exercise "reasonable control" over order of presenting evidence).


\(^{71}\) See supra note 18.

between violations, which can be established by proof that a prohibited factor entered into an employment decisions, and compensatory remedies, which can be avoided upon proof that the plaintiff would have been rejected for entirely legitimate reasons.

A. What Went Wrong in Theory

The theoretical problem with *Price Waterhouse* is how to characterize the issue of "mixed motivation." The plurality opinion of Justice Brennan sometimes characterized the issue as one of "but-for" causation, an analysis pursued by Justice O'Connor in her opinion concurring in the judgment and by Justice Kennedy in his dissent. The differences between these arguments need not detain us. The whole approach to the issue in terms of causes is ill-conceived. Mixed motive cases concern reasons for action, which, if they are causes at all, are very special causes. They do not resemble the physical causes that are familiar from tort law; they are not concerned with physiological mechanisms, but with mental processes. Indeed, Justice Brennan acknowledged such an approach, in terms of reasons for action, but failed to follow it consistently in his opinion. Causation in tort law is

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73 490 U.S. at 240-42 (plurality opinion of Brennan, J.); id. at 262-66 (O'Connor, J., concurring in the judgment); id. at 281-84 (Kennedy, J., dissenting). Justice White concurred on the basis of the prior constitutional decision in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), which concerned a claim for retaliation by a public school teacher for speech protected by the First Amendment. 490 U.S. at 258-60 (White, J., concurring in the judgment).

74 Professor Gudel has criticized the use of the language of causation and motivation on philosophical grounds. Paul J. Gudel, Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law, 70 Tex. L. Rev. 17, 88-96 (1991). Eminent philosophers, however, have taken a less dogmatic and more complex view of the relations between reasons, causes, and motivation. See, e.g., Davidson, supra note 41, at 3-19, 63-81. Prof. Gudel would also abandon any inquiry into whether an employer had multiple reasons for its decision; a discriminatory reason alone would be enough to impose liability. Gudel, supra, at 101-07. However the philosophical debate is resolved, this position cannot be sustained. Although it would be simpler to abandon this inquiry, it is required by both the good cause exception in the original version of § 706(g), 42 U.S.C. § 2000e-5(g) (1988), and the codification of the *Price Waterhouse* defense in the Civil Rights Act of 1991. Pub. L. No. 102-166, § 107, 105 Stat. 1071 (1991) (to be codified at 42 U.S.C. § 2000e-2(m), § 2000e-5(g)(2)(B)). See supra text accompanying notes 31-32.

75 In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the de-
a broad limitation upon an equally broad system of liability under the common law. Claims for employment discrimination, by contrast, are specialized creatures of statute, whose terms should determine the allocation of the burden of proof. Judicial interpretation of a statute is necessarily more limited than judicial decisions under the common law.

None of the opinions in *Price Waterhouse* explained why mixed motivation was an issue of liability, as opposed to remedy, and none of them relied on the language in Title VII that explicitly addresses the issue of mixed motivation. Section 706(g), the general section on remedies under Title VII, restricts compensatory remedies to plaintiffs who were denied a job only for a prohibited reason. Plaintiffs who were denied a job for other, entirely legitimate, reasons are not entitled to reinstatement, backpay, or other forms of compensatory relief.\(^76\)

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cision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.


\(^76\) Civil Rights Act of 1964 § 706(g), 42 U.S.C. § 2000e-5(g) (1988). The full text of this provision reads:

No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) [§ 704(a)] of this title.

Id.

One commentator on *Price Waterhouse* has rejected this reasoning on the ground that this clause does not apply to mixed motive cases. Weber, supra note 13, at 534-36. He argues that the plaintiff should be entitled to full relief whenever the employer’s dominant reason for rejecting him was an illegitimate reason. Id. at 513. Although this proposal might be adopted for other reasons, it cannot be used to explain away the restriction on remedies in § 706(g). If this restriction does not apply to mixed-motive cases, it does not apply to any cases at all, since a restriction on remedies applies only to defendants already found to have violated the statute.

Similar restrictions on remedies can be found in the ADEA and in the Americans with Disabilities Act, although the ADEA classifies this restriction as an affirmative defense. 29 U.S.C. § 623(f)(3) (1988); 42 U.S.C.A. § 12113(a) (West Supp. 1992); Howard Eglit, The
The plurality discussed this provision, but chose not to rely on it for reasons that appear to be entirely circular, if not contradictory.

According to the plurality, because this provision concerned remedies, it could not affect interpretation of the statute’s prohibitions. But the very question at issue was whether mixed motivation was a matter of what is prohibited by Title VII or what is an appropriate remedy.\textsuperscript{77} Both are equally important matters of substantive law, even if one addresses regulation of behavior and the other who can obtain relief. Moreover, the plurality’s own reasoning earlier in the opinion led it to conclude that Title VII does prohibit decisions based on mixed motives.\textsuperscript{78} Since the plurality made clear that it viewed any change in the burden of persuasion as a matter of substantive law, it would have done better to follow the substantive law laid down by Congress rather than reinvent the near equivalent itself.\textsuperscript{79}

\textbf{B. What Is Likely to Go Wrong in Practice}

The practical problems with \textit{Price Waterhouse} are more intractable than the theoretical problem. The Civil Rights Act of 1991 has now corrected the theoretical problem in \textit{Price Waterhouse} by moving the

\textsuperscript{77} 490 U.S. at 244-45 n.10 (plurality opinion of Brennan, J.). The Court's real reason, perhaps, was to restrict awards of attorney's fees. If the defense of mixed motivation were only available to deny compensatory remedies, plaintiffs might still be entitled to an award of attorney's fees on the ground that they had prevailed on the merits. § 706(k), 42 U.S.C. § 2000e-5(k) (1988); see Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Blumrosen, supra note 14, at 1049-51. Even so, an award of attorney's fees can be denied if the plaintiff obtains no benefit from the litigation. Hewitt v. Helms, 482 U.S. 755, 759 (1987).

\textsuperscript{78} 490 U.S. at 237-47 (plurality opinion of Brennan, J.).

issue of mixed motivation firmly to the remedy stage of the case, but it still shifts the burden of persuasion on the issue of mixed motivation to the defendant. Consequently, the issue of violation (or pretext) must still be distinguished from the issue of remedy (or mixed motivation). In *Price Waterhouse*, the Court drew this distinction by defining the question of violation as whether a prohibited reason was a substantial or motivating factor in the disputed employment decision. *Price Waterhouse* then applies only to the question whether the decision would have been the same in the absence of discrimination. The practical question is whether juries can make any sense out of the distinction between pretext and mixed motivation.

Under *McDonnell Douglas*, the plaintiff has the burden of production and persuasion on the issue of pretext. If the plaintiff carries this burden and persuades the judge or the jury that a prohibited reason, such as race or sex, was a substantial factor in the disputed employ-

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Section 703(m) [42 U.S.C. § 2000e-2(m)] provides that "[e]xcept as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

Section 706(g)(2)(B) [42 U.S.C. § 2000e-5(g)(2)(B)] provides:

On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

81 490 U.S. at 249-50 (plurality opinion of Brennan, J.); id. at 259-60 (White, J., concurring in the judgment). Justice White differed from Justice Brennan only in his greater willingness to allow the defendant to rely upon evidence of his own subjective state of mind to satisfy his burden of persuasion. Id. at 261 (White, J., concurring in the judgment). Justice O'Connor also concurred in the judgment, but she would have limited *McDonnell Douglas* still further, to cases in which the plaintiff submitted only circumstantial, not direct, evidence of discrimination. Id. at 270-79 (O'Connor, J., concurring in the judgment).
ment decision, the burden then shifts to the defendant under *Price Waterhouse*. The defendant must produce evidence and persuade the trier of fact that it would have reached the same decision entirely on the basis of legitimate reasons. *McDonnell Douglas* applies only to the question whether the defendant has relied on a prohibited reason in making the disputed employment decision. The plaintiff can carry the burden of persuasion on this issue either by relying on the structure of proof established in *McDonnell Douglas* or by submitting direct evidence of intentional discrimination, such as discriminatory remarks by a supervisor. Once the plaintiff has carried this burden of persuasion, the entire burden of proof, both of production and persuasion, then shifts to the defendant.

The jury must be instructed on the distinction between pretext and mixed motivation in any case in which both issues are submitted to it. The plurality in *Price Waterhouse* conceded the existence of such cases, but, in a considerable understatement, minimized the frequency with which they occur.\(^8^2\) In fact, the issues are so similar that it is difficult to imagine a case that presents one but not the other. Evidence that supports reasonable inferences each way on the issue of pretext will, almost invariably, present reasonable inferences also on the issue of mixed motivation. Price Waterhouse could, and in fact, did, submit evidence that Hopkins did not get along with other partners and employees in the firm in order to show both that sex was not considered in refusing to promote her and that, even if it was, there were other, sufficient reasons, for denying her a promotion.\(^8^3\) In cases tried to a jury, there is little in the way of legal doctrine that saves the jury from confusing instructions on the arcane distinction between pretext and mixed motivation.\(^8^4\)

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\(^8^2\) Id. at 247 n.12 (plurality opinion of Brennan, J.); see Hannah Arterian Furnish, Formalistic Solutions to Complex Problems: The Supreme Court’s Analysis of Individual Disparate Treatment Cases Under Title VII, 6 Indus. Rel. L.J. 353, 365-71 (1984).

\(^8^3\) 490 U.S. at 255-58 (plurality opinion of Brennan, J.).

Jury instructions that sharply distinguish between violations and remedies, following the statutory scheme, might clarify these instructions to some degree. Pretext under *McDonnell Douglas* would be concerned with the question whether the defendant violated the statute; mixed motivation under *Price Waterhouse* with whether the plaintiff was entitled to a remedy. It is, after all, consideration of race, sex, national origin, and religion that the statute prohibits. When an employer considers these factors, it violates the statute. Whether the plaintiff would have been given the job in the absence of discrimination goes to the issue of remedy: whether this particular plaintiff is entitled to compensatory relief.\(^{85}\)

Indeed, for the sake of clarity, it would be better to dispense with the terminology of "pretext" altogether. There is no need to instruct the jury on the issue of pretext under *McDonnell Douglas* because that issue is identical to the issue of discrimination.\(^{86}\) It is enough to instruct the jury on the definition of discrimination under *Price Waterhouse*: that the plaintiff has the burden of persuasion on the issue whether a prohibited reason was a substantial factor in the defendant's decision. The defendant can then seek an instruction on mixed motivation, with the qualification that it bears the burden of persuasion on this issue.

**C. What Difference Does It Make?**

The technical significance of the plaintiff's burden nevertheless appears to be slight. The plaintiff's burden is the standard one in civil

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\(^{85}\) The same distinction has proved useful in class actions and pattern-or-practice actions, in which class-wide questions of systemic discrimination have been distinguished from individual questions of compensatory relief. International Bhd. of Teamsters v. United States, 431 U.S. 324, 367-71 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747, 772 (1976).


Some cases have allowed instructions on *McDonnell Douglas*, but only to inform the jury of inferences that may be drawn from circumstantial evidence presented by the plaintiff or the defendant. Lynch v. Belden & Co., 882 F.2d 262, 268-69 (7th Cir. 1989), cert. denied, 493 U.S. 1080 (1990); see Player, supra note 69, at 669-71.
cases of proof by a preponderance of the evidence.87 This burden is usually defined in terms of probability: "proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence."88 If this definition refers only to a bare mathematical probability, then the burden of persuasion should rarely come into play: only when the probabilities are exactly balanced at .5 for each party. Otherwise, the jury should decide for the party with the stronger evidence, even if that evidence is quite weak, but still slightly stronger than the opposing party's evidence. Some courts have been so disturbed by this result that they have defined "proof by a preponderance of the evidence" to require the jury actually to believe the evidence submitted by the party with the burden of persuasion.89 Such explanations appear to do more harm than good,90 especially since the phrase "more probable than not" need not be explained to the jury in mathematical terms. Even proponents of a mathematical interpretation of the burden of persuasion recognize that any instruction in mathematical terms must be framed with great care.91


88 McCormick, supra note 69, at 957.

89 Id. at 958; 9 John H. Wigmore, Evidence in Trials at Common Law § 2498, at 420-21 (James Chadbourn rev. ed. 1981). The most commonly used model jury instructions in federal court explain preponderance of the evidence in terms both of "more likely than not" and "convincing force":

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.


90 Wigmore thought not. Wigmore, supra note 89, § 2498, at 420.

Empirical studies have found that juries interpret proof by a preponderance of the evidence to require more than simply a bare preponderance of mathematical probabilities.\(^{92}\) Although the empirical evidence alone is slight, it is corroborated by the importance that judges and lawyers attach to the burden of persuasion in civil cases. The former believe that it is a matter of substantive law and the latter believe it is something worth fighting over. These beliefs make sense only on the assumption that the burden of persuasion makes a difference more frequently than in the rare case in which the evidence on an issue is equally balanced. Perhaps by analogy to the requirement of proof beyond a reasonable doubt in criminal cases, the standard of preponderance of the evidence in civil cases leads the jury to resolve its doubts against the party with the burden of persuasion.\(^{93}\) Whatever the explanation, the burden of persuasion appears to have effects that extend beyond its technical procedural meaning.

These effects only add to the difficulty of distinguishing between pretext and mixed motivation. If nine justices on the Supreme Court can take three or four different positions on this distinction,\(^{94}\) a jury of six to twelve lay people is not likely to grasp it by hearing a single set of instructions. Jury instructions that attempt to shift the burden of persuasion on closely related issues are not likely to be successful. The jury is far more likely to place the burden of persuasion entirely on one party or the other.

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\(^{94}\) Price Waterhouse v. Hopkins, 490 U.S. 228, 245-46 (1989) (plurality opinion of Brennan, J.); id. at 260-61 (White, J., concurring in the judgment); id. at 287-90 (Kennedy, J., dissenting).
For this reason, instructions under *Price Waterhouse* pose real risks for the defendant. If he obtains instructions on the issue of mixed motivation, he runs the risk that the jury will impose most of the burden of persuasion upon him, whether or not the plaintiff has carried her burden of persuasion on the issue of pretext. Although the available empirical evidence suggests that juries are generally no more favorable to plaintiffs than judges are on the issue of liability, it also suggests that there is wide variation in results depending on the nature of the plaintiff's claim.\(^{95}\) The general risk of an unsympathetic jury may lead the defendant to forego an instruction on *Price Waterhouse* entirely, for fear that he will also assume the burden of persuasion on the existence of a legitimate, nondiscriminatory reason, contrary to the standard interpretation of *McDonnell Douglas*. The only obstacle to instructions on both issues seems to be the risk, from the defendant’s perspective, that an instruction on mixed motivation will lead the jury to put the entire burden of persuasion upon him.

In several recent cases, employers have tried to avoid this dilemma by relying on “after-acquired” evidence to support motions for summary judgment or directed verdict. “After-acquired” evidence is evidence of the plaintiff’s lack of qualifications, often in the form of false statements on her application for employment, that the employer discovers only after the plaintiff has already been discharged. A representative case is *Wallace v. Dunn Construction Co.*,\(^{96}\) in which the plaintiff alleged that she had been denied equal pay, suffered sexual harassment, and was discharged in retaliation for her complaints. In the course of her deposition, she admitted that she had been convicted, before her employment, of possession of cocaine and marijuana, contrary to the statements she made on her application for employment. The defendant moved for summary judgment on the ground that it would

\(^{95}\) Kevin M. Clermont & Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism, 77 Cornell L. Rev. 1124, 1137, 1141 (1992). In civil rights cases concerned with employment, plaintiffs win about twice as frequently when their cases are tried to juries as they do when their cases are tried to judges sitting alone. Id. at 1175; see also Harry Kalven, Jr., The Dignity of the Civil Jury, 50 Va. L. Rev. 1055, 1065-67 (1964); Eglit, supra note 76, at 205 n.238. For a summary of the empirical findings on this issue, see Marc Galanter, The Civil Jury as Regulator of the Litigation Process, 1990 U. Chi. Legal F. 201, 214-24.

not have hired her because she had used drugs and because she had lied on her application.

The Eleventh Circuit held that summary judgment was properly denied on the plaintiff’s claims for declaratory relief, back pay, and liquidated damages; it should have been granted only on the claims for prospective relief in the form of an injunction, reinstatement or front pay.\(^{97}\) The defendant’s after-acquired evidence might also have limited compensatory relief, but not on the facts of this case. In particular, liability for backpay was tolled only when the employer would have learned of the plaintiff’s false application, in the absence of any claim of discrimination.\(^{98}\) Giving any broader effect to after-acquired evidence would allow employers “to escape all liability by rummaging through an unlawfully-discharged employee’s background for flaws and then manufacturing a ‘legitimate’ reason for the discharge that fits the flaws in the employee’s background.”\(^{99}\) The Eleventh Circuit correctly recognized that the burden of proof was upon the defendant not only to advance some reason that might have justified the plaintiff’s discharge but further, under Price Waterhouse, to show that it applied that reason uniformly to all of its employees.\(^{100}\) The defendant had to prove that it subjected all of its employees to a searching inquiry about the truth of their applications for employment, not just plaintiffs who raised claims of discrimination. In the absence of such evidence, as

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\(^{97}\) 968 F.2d at 1183. After-acquired evidence defeats a claim for prospective relief because it discredits the plaintiff’s qualifications for continued employment. Id. at 1181-82.

Decisions in other circuits, however, have given greater scope to after-acquired evidence, allowing it to defeat claims for all forms of relief. Washington v. Lake County, 969 F.2d 250 (7th Cir. 1992) (employer must prove that it would have fired plaintiff, not just that it could have); Reed v. Amax Coal Co., 971 F.2d 1295, 1298 (7th Cir. 1992) (per curiam) (same); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988) (after-acquired evidence barred all relief to plaintiff); Milligan-Jensen v. Michigan Techni-cal Univ., 975 F.2d 302, 304-05 (6th Cir. 1992) (same), petition for cert. filed, 61 U.S.L.W. 3522 (U.S. Feb. 2, 1993) (No. 92-1214).

\(^{98}\) 968 F.2d at 1182.

\(^{99}\) Id. at 1180. Judge Godbold dissented on the ground that a plaintiff who has falsified an application for employment, on an issue that would have caused the employer not to hire her in the first place, lacks standing to protest any form of discrimination on the job. Id. at 1187-88 (Godbold, J., dissenting). The difficulty with this argument is that it confuses the issue of standing with the plaintiff’s entitlement to relief on the merits.

\(^{100}\) Id. at 1181 n.11, 1182.
this case illustrates, summary judgment cannot be granted entirely for the defendant.

D. What Can Be Done About It?

After Price Waterhouse, jury instructions can be made comprehensible only by refusing to submit one of two issues—either pretext or mixed motivation—to the jury. In her opinion concurring in the judgment, Justice O'Connor tried to reach this result by limiting Price Waterhouse to claims supported by direct evidence of discrimination. The definition of pretext under McDonnell Douglas would then apply only to cases in which the plaintiff relied on circumstantial evidence of discrimination.\footnote{490 U.S. 228, 278 (1989) (O'Connor, J., concurring in the judgment). For criticism of this distinction on similar grounds, see Kovacic-Fleischer, supra note 13, at 656-57.} Her position, however, presupposes a clear distinction between cases based on direct and cases based on circumstantial evidence of discrimination, one that is blurred whenever the plaintiff presents both kinds of evidence. Nevertheless, some lower courts have applied Price Waterhouse only when the plaintiff presents direct evidence of discrimination.\footnote{E.g., Caban-Wheeler v. Elsea, 904 F.2d 1549, 1554 (11th Cir. 1990); Jackson v. Harvard Univ., 900 F.2d 464, 467 (1st Cir.), cert. denied, 111 S. Ct. 137 (1990); Ingram v. Missouri Pac. R.R., 897 F.2d 1450, 1454-55 & n.4 (8th Cir. 1990); Randle v. La Salle Telecommunications, Inc., 876 F.2d 563, 568-69 (7th Cir. 1989); Halbrook v. Reichhold Chems., Inc., 735 F. Supp. 121, 125 (S.D.N.Y. 1990); see Furnish, supra note 82, at 367-68, 374-80.} If the Gordian Knot connecting Price Waterhouse and McDonnell Douglas cannot be cut by some such means, it remains necessary to instruct juries on both pretext and mixed motivation in most cases.

An alternative, now foreclosed by the Civil Rights Act of 1991, is to put the entire burden of persuasion on one party or the other, either by eliminating the defense of mixed motivation entirely or by requiring the defendant also to prove lack of pretext.\footnote{For proposals along these lines, see Robert Belton, Burdens of Pleading and Proof in Discrimination Cases: Toward a Procedural Theory of Justice, 34 Vand. L. Rev. 1205, 1266-71 (1981); Gudel, supra note 74, at 98-100. Such a drastic change may not be necessary. See infra text accompanying notes 104-106, 138.} A less drastic alternative is to increase the burden of production upon both parties under McDonnell Douglas. The standard interpretation of McDonnell Douglas...
Douglas avoids confusion over the burden of persuasion by shifting only the burden of production. Because it is applied entirely by the trial judge, the burden of production can be more precisely allocated between the plaintiff and the defendant. Under existing law, both the plaintiff and the defendant can too easily get to the jury by satisfying their initial burdens of production.

The initial burden upon both the plaintiff and the defendant should not be made lighter, as they have under the prevailing interpretation of McDonnell Douglas, but heavier. As the lower federal courts have recognized,104 the parties must be required to do more than satisfy some minimal standard of proof; they must submit specific evidence of discrimination, in the case of the plaintiff, and of a legitimate, nondiscriminatory reason, in the case of the defendant. The plaintiff should be required to produce specific evidence that she was treated less favorably than similar employees of a different race or sex. Such evidence can take a variety of forms, including evidence discrediting the reason offered by the defendant, but it must go beyond the simple evidence of minimal qualifications required for a prima facie case under McDonnell Douglas. The defendant, in turn, should bear a heavier burden, not just of producing a legitimate reason that might have justified a decision adverse to the plaintiff, but of producing evidence that the reason did in fact play a role in the decision. The defendant must do more than prove that there might have been a rational basis for rejecting the plaintiff, in the weak sense used in constitutional review of economic legislation under the Due Process Clause.105 The defendant should be required to produce evidence that a plausible reason was, in fact, the real reason for rejecting the plaintiff.

The first of these burdens, upon the plaintiff, can be enforced directly through motions for summary judgment, directed verdict, and judgment notwithstanding the verdict. As the next part demonstrates, decisions on these issues dominate the reported opinions on individual

104 See infra text accompanying notes 107-23.
105 See supra text accompanying notes 33-36.
claims of employment discrimination.\textsuperscript{106} The burden of production upon the defendant can be enforced indirectly by making it easier for a plaintiff who has specific evidence of discrimination to show pretext. Increasing the defendant’s burden of production should effectively decrease the plaintiff’s burden, for instance, by allowing the plaintiff who has evidence discrediting the legitimate, nondiscriminatory reason offered by the defendant to get to the jury. Discrediting the reason offered by the defendant should usually generate a reasonable inference that the plaintiff was rejected for a prohibited reason.

IV. ATTEMPTS TO ADAPT \textit{MCDONNELL DOUGLAS}

Following the lead of the Supreme Court, the lower federal courts have not expressed much confidence in \textit{McDonnell Douglas}. They have regarded its structure of proof as nothing more than a “three-step minuet of shifting burdens of production.”\textsuperscript{107} They have tried, in various ways, to adapt these shifting burdens of production to apply to the full range of employment discrimination cases and to resolve motions for summary judgment and directed verdict. Although their efforts to reformulate \textit{McDonnell Douglas} have been largely unsuccessful, their decisions reveal a pattern of requirements, particularly specific evidence of discrimination, that can usefully be added to the plaintiff’s burden of production.

At first, some of the lower federal courts tried to augment the requirements of the plaintiff’s prima facie case. In particular, they tried to augment the second element of the prima facie case, proof of the plaintiff’s qualifications, by requiring proof of relative, not just minimal qualifications. They would have required the plaintiff to prove that she had qualifications superior to those of the employee eventu-


ally selected for the job.108 The Supreme Court cut this development short in United States Postal Service Board of Governors v. Aikens,109 by stressing that such cases ordinarily should be decided on the issue of pretext after all the evidence was in.110 Whether the plaintiff had the burden of production on the issue of qualifications, as the original formulation in McDonnell Douglas suggested, or whether it was part of the defendant’s burden of producing a legitimate, nondiscriminatory reason, was irrelevant once the issue of pretext was before the court.

This holding makes good sense, as far as it goes, but it should have gone one step further: the entire terminology of “prima facie case” overstates the force of the evidence necessary to satisfy the plaintiff’s initial burden under McDonnell Douglas.111 It suggests that this evidence is sufficient to get the plaintiff to the jury, when, in fact, it is not. The plaintiff cannot survive a motion for summary judgment or for directed verdict simply by satisfying this initial burden of production if the defendant has submitted evidence of a legitimate reason for rejecting the plaintiff, as almost all defendants in fact do.112 Unless the initial burden upon the plaintiff is increased to make it more difficult for the defendant to succeed on a motion for summary judgment, it only invites confusion to call the plaintiff’s initial showing a “prima facie case.”

Defeated in one attempt to rework the structure of proof of McDonnell Douglas, the lower federal courts have tried to extend the

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108 Alisa D. Shudofsky, Note, Relative Qualifications and the Prima Facie Case in Title VII Litigation, 82 Colum. L. Rev. 553, 559-61 (1982).
110 Id. at 715.
111 The Court had noted a similar confusion earlier in Furnco Construction Corp. v. Waters, 438 U.S. 567, 576-78 (1978).
Reconsidering Burdens of Proof

scope of the decision and, at the same time, to adapt it to different, more specific fact situations. The lower federal courts are not usually faced with cases that concern discrimination in hiring, the claim that was raised in *McDonnell Douglas* itself. The single largest category of cases concern discharges, many tried to a jury under the ADEA.¹¹³ The structure of proof from *McDonnell Douglas* does not fit discharge cases nearly as well as hiring and promotion cases. The fourth element of the plaintiff's initial burden, proof that the defendant continued to accept applications for the position sought by the plaintiff, simply may not apply.¹¹⁴ A discharge may result from a layoff or a restructuring of the defendant's operations. The plaintiff may nevertheless be a victim of discrimination, even though her position has disappeared.

This problem goes beyond the simple need to adapt *McDonnell Douglas* to claims of discrimination in discharges or layoffs. It is indicative of a more general problem with taking discrimination in hiring as the model for employment discrimination generally. Few claims of discrimination, in fact, are brought by plaintiffs who apply for jobs just off the street. Most plaintiffs are already employed by the defendant, have been employed in the recent past, or have obtained the training necessary for a skilled or professional position.¹¹⁵ In economic terms, these employees have invested human capital in firm-specific skills—skills that are more or less specialized to employment with the defendant.¹¹⁶ Common sense supports this observation: few plaintiffs would go to the trouble and expense of bringing a claim for discrimination if they could easily seek an equally attractive job with

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¹¹³ Donohue & Siegelman, supra note 4, at 1011-21. A search of all cases decided in April and May 1990, on Westlaw's Court of Appeals (CTA) database, found 64 cases in which the plaintiff alleged a claim of employment discrimination under Title VII, § 1981, or the ADEA. Only one of these cases was brought by a plaintiff who simply applied for a job and was rejected. Forty cases were brought by plaintiffs who were discharged and twelve by plaintiffs who were denied a promotion. The remaining eleven cases were all brought by incumbent employees who alleged discrimination in transfers or demotions, reverse discrimination, or discriminatory treatment in the workplace.

¹¹⁴ See, e.g., Branson v. Price River Coal Co., 853 F.2d 768, 771 & n.5 (10th Cir. 1988); Oxman v. WLS-TV, 846 F.2d 448, 454-55 (7th Cir. 1988); Williams v. General Motors Corp., 656 F.2d 120, 128 (5th Cir. 1981), cert. denied, 455 U.S. 943 (1982).

¹¹⁵ See supra note 113.

another employer. Only when they are to some extent "locked in" to employment with the defendant will they accept the costs of a lawsuit. Again, the facts of McDonnell Douglas prefigured this generalization. Green himself claimed discrimination only in McDonnell Douglas's refusal to rehire him.

The courts of appeals have attempted to adapt McDonnell Douglas to different claims by distilling more specific rules applicable to particular fact situations. These attempts have foundered on the same difficulties as the original structure of proof in McDonnell Douglas: the burdens of production that they specify are either too easily satisfied or too narrowly confined to particular fact situations. A full array of more specific standards would raise additional questions about how particular cases are to be categorized. Such standards provide, at most, useful guidelines for assessing the evidence presented by the parties, not rigid rules for determining the sufficiency of the evidence in narrow categories of cases. To insist upon such rules would be to repeat the old debate in tort law over the choice between specific rules, like "stop, look, and listen" at railroad crossings and the more general standard of negligence. That debate was resolved in favor of negligence as a general standard of reasonable care.117 The history of interpretation of McDonnell Douglas discredits the idea that discrimination, any more than negligence, can be reduced to a set of specific rules which can then be more or less mechanically applied.

Several circuits, for instance, have modified McDonnell Douglas in discharge cases to require the plaintiff to prove either that she was replaced by someone outside the protected class118 or that she was treated less favorably than employees outside the protected class.119 In age discrimination cases, in particular, some circuits have held that the plaintiff must produce evidence that she was at least forty years old,

118 E.g., Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309, 313 (6th Cir. 1989); Branson v. Price River Coal Co., 853 F.2d 768, 770 (10th Cir. 1988); Goldberg v. B. Green & Co., 836 F.2d 845, 849 (4th Cir. 1988); see Fields v. J.C. Penny Co., 968 F.2d 533, 537 (5th Cir. 1992) (per curiam) (no other evidence of age discrimination); Player, supra note 69, at 636-44; Cuellar, supra note 106, at 531.
that she was discharged or laid off, that she was performing her job in a satisfactory way, and either that she was replaced by someone under forty years or that she was treated less favorably than employees under forty.\textsuperscript{120} The first two elements are identical to the first and third elements of the plaintiff's initial case under \textit{McDonnell Douglas}, and they are just as easy to satisfy. They only serve to identify the claim as one of age discrimination in a discharge or layoff. The third element, which corresponds to proof of qualifications under \textit{McDonnell Douglas}, can be given a stronger or weaker interpretation; it requires proof either of minimally adequate performance or of performance better than that of the employees who were retained. The choice between these interpretations just recapitulates the choice between minimal and relative qualifications, precisely the choice rejected in \textit{United Postal Service Board of Governors v. Aikens}.\textsuperscript{121}

Even the last element—proof of replacement by, or less favorable treatment than, those under forty—shares many of the defects of \textit{McDonnell Douglas}. If taken literally, it excludes layoffs and restructuring of personnel from its scope because it requires proof that the plaintiff’s job survived long enough to be occupied by a person under forty. Even passing this problem, however, this requirement continues to suppose, without any legal or factual basis, that age discrimination against a plaintiff who is fifty, in favor of a replacement who is forty, is not prohibited by the statute.\textsuperscript{122} If the requirement is modified to allow proof of age discrimination in favor of any employee, regardless of his age, the requirement achieves the necessary degree of flexibility, but at the cost of circularity: it just incorporates proof of age discrimination into a structure of proof that is designed to break age discrimination down into its component parts.\textsuperscript{123}

\textsuperscript{120} See supra notes 118-19.

\textsuperscript{121} See supra text accompanying notes 108-10.

\textsuperscript{122} See Maxfield v. Sinclair Int'l, 766 F.2d 788, 792-93 (3d Cir. 1985), cert. denied, 474 U.S. 1057 (1986); Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435, 1442-43 (11th Cir.), cert. denied, 474 U.S. 1005 (1985); McCorstin v. United States Steel Corp., 621 F.2d 749, 754 (5th Cir. 1980).

\textsuperscript{123} The courts of appeals have also articulated special standards for proof of retaliation against the plaintiff for asserting claims of discrimination or otherwise opposing discriminatory practices. 29 U.S.C. § 623(d) (1988); Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a) (1988). These standards bear little resemblance to the structure of proof under \textit{McDonnell Douglas}, but they suffer from the same inability to advance the analysis of dif-
V. FORMULATING THE BURDEN OF PROOF

As the preceding examples illustrate, more specific standards for resolving individual claims of employment discrimination have not succeeded where McDonnell Douglas failed. Like that decision, these standards are not entirely useless, but at most they only identify the obvious, easily proven elements of the plaintiff’s claim. Most cases must still be resolved on some version or other of the issue of pretext: whether the adverse decision was based entirely on legitimate reasons or on any reason prohibited by the statute. Instead of searching for ways to break this question down into discrete elements, it would be better to confront the crucial procedural questions directly: What must the plaintiff do to survive a motion for summary judgment or for directed verdict? How much evidence is enough to satisfy the plaintiff’s burden of production?

The practice of the lower federal courts in addressing these questions is more revealing than the standards they have articulated. They have generally required the plaintiff to submit specific evidence. This evidence usually discredits the legitimate, nondiscriminatory reason offered by the defendant, but it can take a variety of different forms: evidence of a discriminatory environment or of discriminatory attitudes that affected the employment decision, evidence of disparities in the treatment of different groups, or evidence of the plaintiff’s qualifi-

ficult cases. In most circuits, in order to make out a claim of retaliation, the plaintiff must show that she engaged in protected activity, that she was rejected in some way by the employer, and that there was a causal connection between her protected activity and the employer’s decision. See, e.g., Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989), cert. denied, 493 U.S. 1023 (1990); Taitt v. Chemical Bank, 849 F.2d 775, 777 (2d Cir. 1988); Miller v. Fairchild Indus., Inc., 797 F.2d 727, 731 (9th Cir. 1986), cert. denied, 494 U.S. 1056 (1990). The first and second of these elements correspond to the first and third under McDonnell Douglas: membership in a protected group and rejection by the employer. Again, these elements are easily established, and again, they serve mainly to identify the character of the plaintiff’s claim. Claims of retaliation do not allege discrimination on the basis of personal characteristics, like race or sex, but discrimination for protesting against other instances of discrimination. Proof of causation, although crucial to a claim of retaliation, suffers from the familiar defect of circularity. Like pretext under McDonnell Douglas, it just restates the definition of prohibited discrimination. A causal connection between protests by the plaintiff and an adverse decision by the defendant is just what retaliation means, subject to the added complications of mixed motivation after Price Waterhouse.
cations or performance on the job.\textsuperscript{124} The evidence must be specific enough to go beyond a conclusory allegation of discrimination and a simple denial of the defendant's reasons for the adverse decision.\textsuperscript{125} Any plaintiff could produce such evidence by affidavit or testimony, and although such statements are sufficient for pleading under the Federal Rules of Civil Procedure,\textsuperscript{126} motions for summary judgment and directed verdict demand something more. The plaintiff's failure to produce evidence of an element that is essential to her case is sufficient grounds for granting summary judgment for the defendant.\textsuperscript{127} Such a gap in the plaintiff's case cannot be filled simply by a sworn statement from the plaintiff that the missing fact is true. In order to get to the jury, the plaintiff must do more than simply swear that the reason offered by the defendant is false.

A leading case that addressed this issue is \textit{Chipollini v. Spencer Gifts, Inc.},\textsuperscript{128} in which the Third Circuit, sitting en banc, held that the plaintiff submitted sufficient evidence to survive a motion for summary judgment by discrediting the legitimate reason offered by the defendant. Chipollini alleged that he had been discharged on the basis of age. Like most plaintiffs who assert claims under the ADEA, he exercised his right to jury trial, and like most defendants, Spencer Gifts moved for summary judgment. In support of its motion, Spencer Gifts submitted evidence that Chipollini, a construction manager, had re-

\begin{footnotesize}
\begin{enumerate}
\item[124] Patterson v. McLean Credit Union, 491 U.S. 164, 186-88 (1989); Haglof v. Northwest Rehabilitation, Inc., 910 F.2d 492, 494 (8th Cir. 1990); Player, supra note 69, at 662-66.
\item[128] 814 F.2d 893 (3d Cir.) (en banc), cert. dismissed, 483 U.S. 1052 (1987).
\end{enumerate}
\end{footnotesize}
ceived declining performance evaluations, had not performed ade-
quately as an “energy warden,” had been inflexible and uncooperative
in dealing with his supervisors, and had suffered from phlebitis, which
had reduced his ability to travel.\textsuperscript{129} None of these reasons, upon ex-
amination, proved to be compelling, and to the extent possible,
Chipollini relied upon evidence that contradicted them in detail. Thus,
his performance evaluations had remained good, and letters of rec-
ommendation from one of his superiors, written after his discharge,
continued to praise him. His duties as “energy warden,” according to
his own affidavit, had never been made clear to him. His poor attitude
was not documented by evaluations or by specific incidents recalled
by his supervisors, and his phlebitis, again according to his deposition,
arose after his discharge and did not affect his record of minimal ab-
sences from work.\textsuperscript{130}

Most of the court’s opinion and all of the dissent addressed the
question whether the plaintiff was required to do more than simply
discredit the reason offered by the defendant. Some courts, unlike the
Third Circuit, have held that the plaintiff must submit additional evi-
dence, not just that the defendant’s offered reason was not the real rea-
son, but that it was a pretext for a prohibited reason, such as age.\textsuperscript{131}
Although these cases have relied on the correct definition of pretext,\textsuperscript{132}
they have overly restricted the means by which it may be proved. As
the Third Circuit emphasized in \textit{Chipollini}, an inference of pretext can
usually be drawn from evidence discrediting the defendant’s offered
reason.\textsuperscript{133} In an unusual case, of course, it may not, as when the plain-

\textsuperscript{129} Id. at 896, 900-01.

\textsuperscript{130} Id. at 900-01.

\textsuperscript{131} E.g., Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1508 (5th Cir. 1988); Dea
v. Look, 810 F.2d 12, 15 (1st Cir. 1987). Even then, some courts have refused to give any
weight to the plaintiff’s direct evidence of discrimination. See, e.g., EEOC v. Clay Printing
Co., 955 F.2d 936, 941-42 (4th Cir. 1992) (manager’s comments about age, seniority and
cost of work force deemed insufficient to show discriminatory motive). For criticism of
these cases, see Lancot, supra note 24, at 100-36.

\textsuperscript{132} See supra text accompanying notes 21, 23-51, 61.

\textsuperscript{133} 814 F.2d at 900-01; accord Texas Dep’t of Community Affairs v. Burdine, 450 U.S.
1990); Hagløf v. Northwest Rehabilitation, Inc., 910 F.2d 492, 494 (8th Cir. 1990). For a
summary of the different views of the circuits on this issue, see Olivera v. Nestle Puerto
Rico, Inc., 922 F.2d 43, 47-49 (1st Cir. 1990).
ttiff's evidence shows that he was denied a job, not for lack of qualifications, but in order to hire a supervisor's relative.\textsuperscript{134} Nevertheless, pretext can be proved by either direct or indirect evidence, usually including evidence discrediting the defendant's offered reason.

This issue appears to be easy enough, but \textit{Chipollini} raises the more difficult issue of how much evidence the plaintiff must submit even to raise an indirect inference of pretext. As the facts of the case illustrate, the evidence required of the plaintiff inevitably depends upon the evidence submitted by the defendant. Chipollini was not required to prove that he had a cooperative attitude when his supervisor only offered the unsubstantiated opinion that he did not. On the other hand, if the supervisor had offered specific instances of lack of cooperation, the burden on Chipollini would have been correspondingly greater to rebut or explain these incidents. Many cases have granted summary judgment for the defendant when the plaintiff has been unable to offer any direct evidence of discrimination or any specific evidence discrediting the particular reasons offered by the defendant.\textsuperscript{135} These cases are consistent with the modern view of summary judg

\textsuperscript{134} Holder v. Raleigh, 867 F.2d 823, 825-26 (4th Cir. 1989); Goostree v. Tennessee, 796 F.2d 854, 861-62 (6th Cir. 1986), cert. denied, 480 U.S. 918 (1987). These decisions presuppose that nepotism does not constitute discrimination on the basis of race, sex, or age, an assumption that may not be warranted in many cases.


A comment has argued that these cases are inconsistent with \textit{Chipollini} because the Third Circuit held that a prima facie case under \textit{McDonnell Douglas} was sufficient to defeat a motion for summary judgment. Cuellar, supra note 106, at 535-39. The Third Circuit, however, specifically held that the presumptive force of the plaintiff's prima facie case was dissipated by the defendant's submission of a legitimate nondiscriminatory reason. 814 F.2d at 898. The Third Circuit has followed this reasoning in subsequent cases in which it has affirmed summary judgment for the defendant. E.g., Fowle v. C & C Cola, Div. of ITT-Continental Baking Co., 868 F.2d 59 (3d Cir. 1989); Healy v. New York Life Ins. Co., 860 F.2d 1209, 1218-20 (3d Cir. 1988), cert. denied, 490 U.S. 1098 (1989); Spangle v. Valley Forge Sewer Auth., 839 F.2d 171, 173-74 (3d Cir. 1988); Hankins v. Temple Univ., 829 F.2d 437, 440 (3d Cir. 1987).
ment as a device for testing whether the plaintiff has satisfied her burden of production,\textsuperscript{136} even on issues of intent.\textsuperscript{137}

In the typical case alleging discriminatory discharge, the pre-existing relationship between the plaintiff and the defendant makes it easier for the plaintiff to develop specific evidence of discrimination, and in particular, evidence that links the alleged discrimination with the defendant's business practices or the attitudes of its supervisors. A plaintiff who is acquainted with the defendant's operations can be expected to go beyond a simple statement that the defendant has engaged in discrimination or a simple denial that the defendant's offered reason is false. A plaintiff who is in this position can be expected to come up with some substantiating evidence that discrimination is consistent with the defendant's general business practices or the attitudes of its supervisors. For instance, a plaintiff might be expected to demonstrate that the defendant is more likely to lay off older employees because they receive higher salaries or that the defendant's supervisors hold discriminatory stereotypes on the basis of race or sex. Conversely, when the plaintiff is not an incumbent employee, the effective burden of production upon the plaintiff should be reduced. An incumbent employee can more easily obtain evidence of discrimination than an applicant who knows nothing of the defendant's employment practices. Even though discovery is available to all plaintiffs alike, it is much more expensive than alternative forms of investigation and, when it is used, it can be used more efficiently by plaintiffs who know what they are looking for.

If the plaintiff's burden under \textit{McDonnell Douglas} has been increased, in practice, to require specific evidence of discrimination, the defendant's burden of producing evidence should also be increased. Instead of simply articulating a legitimate, nondiscriminatory reason for its decision to reject the plaintiff, the defendant should be required to submit evidence that the same reason has been applied to other employees outside the plaintiff's protected class. The Supreme Court has


put the burden of producing such evidence on the plaintiff, as part of
the plaintiff’s showing of pretext, but it is apparent that the defend-
ant will have better access to such comparative evidence than the
plaintiff. An employer is in a better position than an employee to
submit evidence of its employment practices and its treatment of em-
ployees from different groups. In a rare case, the defendant may be
able to justify special treatment of the plaintiff without proof of a gen-
eral policy or practice, but if so, the defendant should be able to show
why there was no occasion to treat other employees in the same way.
Unlike a showing of good cause or of business necessity, evidence of a
general practice does not require an examination of the merits of the
defendant’s employment practices, only that they are generally applied
to its employees.

Such evidence of comparative treatment is often crucial for struc-
tural reasons that distinguish claims of employment discrimination
from constitutional issues of legislative intent. Prohibited discrimina-
tion cannot be defined only subjectively. The reasons articulated by
the defendant for rejecting the plaintiff must be connected to the de-
fendant’s business practices and goals. Merely plausible reasons are
insufficient precisely because they may not be the defendant’s actual
reasons. A fundamental defect of McDonnell Douglas is that it invites
a comparison between an abstract inference of discrimination, gener-
ated by the plaintiff’s prima facie case, and an equally abstract busi-
ness justification generated by the defendant’s rebuttal. Instead of
comparing two equally abstract, and equally tenuous inferences, the
courts should require both parties to advance more evidence of what
the defendant’s actual reasons were. If the defendant’s reasons were
discriminatory, this should be corroborated in the attitudes and prac-
tices of the employer and its agents. If they are justified by some neu-
tral personnel policy, that too should be revealed by actual practices in
the workplace. Instead of thinking of discriminatory intent as a wholly
subjective state of mind that can be proved only with difficulty by ob-

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139 The Seventh Circuit has been particularly adamant in emphasizing this distinction be-
tween claims for wrongful discharge and claims of discrimination. E.g., McCoy v. WGN
Continental Broadcasting Co., 957 F.2d 368, 370-72 (7th Cir. 1992). Other circuits, how-
ever, have emphasized the same point. See, e.g., Hanchey v. Enargas Co., 925 F.2d 96, 98
(5th Cir. 1990); Lucas v. Dover Corp., 857 F.2d 1397, 1403-04 (10th Cir. 1988).
jective evidence, it is more accurate to think of it as reasons that must be revealed in the defendant’s behavior. The treatment of different groups of employees is therefore not just evidence of the employer’s reasons, it embodies the reasons themselves.

The defendant, not the plaintiff, should therefore be required to submit evidence that it has treated other employees in the same way. Although defendants would rarely fail to carry even this enhanced burden of production, so that summary judgment would rarely be granted against them, they should be required to meet this burden as a prerequisite to their own motions for summary judgment. As in Chipollini, the evidence of pretext required of the plaintiff should depend upon the evidence of a legitimate reason submitted by the defendant. The issue of pretext cannot be analyzed into ever finer issues of fact or law without running the risk of confusing the jury. If burdens of proof are to assist in resolving individual claims of discrimination at all, they must do so by giving the parties some guidance about the evidence they should present, not in giving judges and juries a foolproof algorithm for deciding difficult cases.

CONCLUSION

The history of subsequent interpretations and applications of McDonnell Douglas makes clear that it has not served the purpose for which it was intended. At most, it made only a promising start by requiring the defendant to “articulate some legitimate, nondiscriminatory reason” for rejecting the plaintiff. This promising start was then lost in confusions, first over the meaning of the plaintiff’s “prima facie case,” then over the differences between burdens of production and burdens of persuasion, and most recently, over the difference between the issues of pretext and mixed motivation. The courts should give up the task of analyzing the definition of intentional discrimination, and instead look at what evidence is readily available to the parties. Following what the lower courts have done with McDonnell Douglas, as opposed to what they have said about it, I have suggested that the plaintiff should be required to submit specific evidence of discrimination, usually evidence discrediting the reason offered by the defendant for its decision, and that the defendant should be required to submit evidence that its offered reason was its general business practice. These modest changes in the law will not solve all the problems that
arise in the many individual cases filed under the federal laws against employment discrimination. They will, however, restore a useful role to the burdens of proof that have dominated the trial and decision of these cases.